Supreme Court, U.S.
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No. 94 - _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

In re ARTHUR CALDERON,
Warden of San Quentin
Prison and
DANIEL E. LUNGREN,
Attorney General of the
State of California

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (WILLIAM C. CANBY, JR., STEPHEN REINHART, AND STEPHEN S. TROTT, CIRCUIT JUDGES)

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33 pp

QUESTION PRESENTED

Does the state's interest in the administration of criminal justice and finality of judgments dictate that the Ninth Circuit Court of Appeals should issue an opinion in a capital case after denial of habeas corpus within 120 days of submission of a case for decision following briefing and oral argument?

Is the failure to issue an opinion seven months after oral argument in a death penalty case and over five years after issuance of a federal stay of execution inconsistent with this Court's directive in In re Blodgett, 502 U.S. ____, 116 L. Ed. 2d 669, 112 S. Ct. 674 (1992) that the court must "exercise all due diligence and render its opinion forthwith"?

PARTIES

Warden Arthur Calderon and California Attorney General Daniel E. Lungren are the

Petitioners for the State of California. Melvin Meffrey Wade, an inmate sentenced to death under the laws of California, is the subject of the underlying appeal from the denial of a Petition for Writ of Habeas Corpus.

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Petitioners pray that, pursuant to the All Writs Act, (section 1651, subdivision (a) of Title 28 of the United States Code), a Writ of Mandamus be issued in Wade v. Vasquez, Case Number 90-56332, to compel the United States Court of Appeals for the Ninth Circuit (the Honorable William C. Canby, Jr., Stephen Reinhart, and Stephen S. Trott, Circuit Judges) to decide the appeal that has been pending before it for over three years

since the initial certificate of probable cause issued and over seven months since oral argument was heard and the case was submitted for decision.

OPINIONS BELOW

Melvin Wade, an inmate sentenced to death under the laws of California, has appealed the denial of his petition for writ of habeas corpus challenging his 1982 state court conviction. A federal stay of execution issued on January 12, 1989, remains in effect.

On May 21, 1982, Melvin Wade was sentenced to death for the murder of his 10-year-old step-daughter. His conviction and sentence were affirmed on direct appeal. People v. Wade 44 Cal.3d 366, 750 P.2d 794, 244 Cal.Rptr. 905 (1988); Wade v. California, 488 U.S. 100, 102 L. Ed. 2d 237, 109 S. Ct. 248 (1988).

On January 12, 1989, a stay of execution was issued by the district court

and a Petition for Writ of Habeas Corpus was filed. On February 12, 1990, the district court ordered an evidentiary hearing on claims of ineffective assistance of counsel and jury misconduct. After an evidentiary hearing, the district court denied writ of habeas corpus on September 14, 1990. Wade v. Vasquez, 752 F.Supp. 9, 31 (C.D. Cal. 1990). Certificate of Probable Cause was issued on December 17, 1990.

On April 21, 1992, the Ninth Circuit Court of Appeals supplemented the record on appeal with special counsel's exhibits A through Z and remanded the case to the district court to permit special counsel to present additional facts on Wade's pre-hearing request for substitution of counsel and to permit the district court to receive any additional evidence it deemed appropriate on the conflict issue. The district court held a

second evidentiary hearing on remand on August 31, and September 1, 1992. On December 9, 1992, the district court issued an opinion and order finding neither Attorney Helft nor the public defender had any conflict of interest. Certificate of Probable Cause issued on March 4, 1991.

Both the merits and conflict issues were briefed on appeal. On June 16, 1993, oral argument was presented to Justices Reinhart, Canby and Trott and the case was submitted for decision. No opinion has issued.

There has been a federal stay of execution on this case since January 12, 1989, which remains in effect.

On December 3, 1993, Respondents requested a decision on the case by letter to the Ninth Circuit Court of Appeals. No reply to that request was issued.

On January 31, 1994, the State filed a "Motion for Decision Within 60 Days." On February 7, 1994, the motion was denied. The court observed that the motion involved "a first petition" and was inconsistent with its duty to give a full and fair consideration to all of the issues presented in the case. Exhibit A. Over five years after the issuance of a federal stay of execution, no opinion has been filed in this case

JURISDICTION

This Court has jurisdiction under sections 1651, subdivision (a) and 2254 of Title 28 of the United States Code and Rule 20.1 of the United States Supreme Court Rules.

The district court had jurisdiction in Wade's petition for writ of habeas corpus under sections 2241, subdivision (a) and 2254 of Title 28 of the United States Code.

The Court of Appeals has jurisdiction to review the denial of the petition for writ of habeas corpus under section 1291 of Title 28 of the United States Code.

STATEMENT OF THE CASE

A. Procedural Background

1. Direct Appeal

A jury convicted Wade of the 1981 murder of his 10-year-old step-daughter, Joyce. After accusing the child of smelling and not washing herself properly, Wade beat her with his fists, a wooden board from a broken couch and kicked and stomped her. Wade placed Joyce inside a military duffle bag which he hoisted into a crawlspace in a ceiling above the bedroom, threw her against a wall with such force that her head penetrated the wall and at one point tried to hang her to a wall by a dog leash. The child died from wounds suffered during the

22-hour ordeal. People v. Wade, 44 Cal. 3d 366, 244 Cal. Rptr. 905, 750 P.2d 794 (1988).

2. Federal Habeas Corpus, District Court Evidentiary Hearings and Appeal

Wade filed a federal habeas corpus petition on January 12, 1989, then returned to state court to exhaust his remedies by filing a petition on March 27, 1989. That petition was denied on June 21, 1989, and Wade amended his federal petition on August 8, 1989.

On May 22, 1990, a one-week evidentiary hearing commenced in the district court before the Honorable Manuel Real, on issues of jury misconduct and ineffective assistance of counsel. The writ of habeas corpus was denied on September 14, 1990. Wade v. Vasquez, 752 F. Supp. 9 (C.D. Cal. 1990). The Ninth Circuit remanded the case on April 21, 1992, for the district court to receive

any additional evidence it deemed appropriate on Wade's claim that his public defender had a conflict of interest. After an evidentiary hearing on August 31, and September 1, 1992, the district court decided on December 9, 1992, that there was no conflict of interest. An appeal was taken from that decision. The issues raised by the denial of the writ of habeas corpus and findings on the conflict claim were fully briefed.

On June 16, 1993, the appeals from the denial of the writ and conflict of interest ruling were argued and submitted for decision.

On February 7, 1994, the State's motion for a decision was denied. This petition follows that denial.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S UNREASONABLE DELAY IN DECIDING WADE'S APPEAL FROM THE DENIAL OF HABEAS CORPUS IN THIS CAPITAL CASE VIOLATES THE DUE PROCESS RIGHTS OF CALIFORNIA AND THE STATE'S ABILITY TO TIMELY ENFORCE ITS LAWS

While there are no deadlines for decisions by the federal Courts of Appeal, the delay in this case is per se unreasonable under Blodgett. The state is deprived of its sovereign power to enforce its criminal laws by unreasonable delay in deciding capital cases.

A federal stay of execution issued on this case over five years ago and remains in effect. Wade's petition for habeas corpus was denied by the district court and a certificate of probable cause issued over four years ago.

Following remand by the Ninth Circuit Court of Appeals almost two years ago, the district court held a second evidentiary hearing regarding Wade's claim

that his public defender had a conflict of interest. The district court issued an opinion finding no conflict and a certificate of probable cause was issued on March 4, 1992.

The case has been pending in the Ninth Circuit Court of Appeals since 1990, at one stage or another. Oral argument was presented to the Court of Appeals on June 16, 1993, and the case was submitted for decision.

The state cannot agree with the Ninth Circuit's February 7, 1994, conclusion that a decision in this case within 60 days is inconsistent with the court's obligations under this Court's decision in Blodgett.

The State requests a writ of mandate based on the inordinate and inexplicable delay in the Ninth Circuit deciding Wade's appeal from the denial of collateral relief.

Under the All Writs Act, 28 U.S.C. § 1651(a), the federal Courts of Appeal may issue a writ of mandate when it is "necessary or appropriate in aid of their respective jurisdictions." Will v. Calvert Fire Insurance Company, 437 U.S. 655, 661 (1978) (plurality opinion); Roche v. Evaporated Milk Association, 319 U.S. 21 (1943). This Court has long recognized this authority, and stated when it should be used.

> Applications for a mandamus to a subordinate court are warranted by the principles and usage of law in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a court, having heard the cause, refuses to render judgment or enter a decree of in the case.

Ex Parte Newman, 81 U.S. (14 Wall.) 152, 165 (1872), emphasis added. Repeated decisions of this Court have established the rule that mandamus "will lie in a proper case to direct a subordinate

Federal Court to decide a pending cause." Insurance Company v. Comstock, 83 U.S. (16 Wall.) 258, 270 (1872); Will v. Calvert Fire Ins. Co., 437 U.S. at 662; Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 352 (1976).

For mandamus to issue, there must be a clear right to the relief sought, a plainly defined and peremptory duty on the part of the respondent to do the action in question, and no other adequate remedy is available. The petitioner must also show that the right to the writ is "clear and indisputable." Mallard v. United States Dist. Court for the S. Dist. of Iowa, 490 U.S. 296 (1989); Allied Chemical Corp v. Diaflon Inc., 449 U.S. 33, 35-36 (1980). California has demonstrated each criteria established by this Court and the Ninth Circuit's failure to act in the appeal pending before it warrants relief in this Court. LaBuy v.

Howes Leather Company, 352 U.S. 249, 259-260 (1957) (writs on mandamus may be used for "supervisory control of the District Courts by the Court of Appeals.")

1. The Ninth Circuit Court of Appeals has a duty to act in a prompt fashion in capital habeas corpus cases

There is general agreement among the Circuit Courts that "[h]abeas corpus is a speedy remedy entitled to preferential consideration." McClellan v. Young, 421 F.2d 690, 691 (6th Cir. 1970); Johnson v. Rogers, 917 F.2d 1283, 1284 (10th Cir. 1990); Van Buskirk v. Wilkinson, 216 F.2d 735, 737-738 (9th Cir. 1954). Recently, this Court stated that it would not tolerate unreasonable delay in a capital habeas corpus case, and held that such delay could be the basis of a mandamus petition.

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all

> steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

In re Blodgett, 502 U.S.____, 116 L. Ed. 2d 669, 112 S. Ct. 674, 676 (1992) emphasis added.

By not promptly resolving this matter before it, the Ninth Circuit has failed in the instant case to follow the dictates in In re Blodgett.

It has failed in its "duty to take all steps necessary to ensure a prompt resolution of the matter." Blodgett, 112 S. Ct. at 676, emphasis added.

2. Mandamus is the only available means to ensure the prompt resolution of the instant case

A petition for writ of mandamus to a higher court is the appropriate action when an inferior court refuses to act on a case pending before it.

> There case be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ [of mandamus] "in order that [it] may exercise the jurisdiction of review given by law."

Will v. Calvert Fire Ins., 437 U.S. at 661-662 (quoting Insurance Company v. Comstock, 83 U.S. (16 Wall.) at 270; Ex Parte Newman 81 U.S. (14 Wall.) at 165. The State of California has no other available remedy to ensure a prompt resolution of these cases except a mandamus petition.

The prejudice suffered by the State through the dilatory actions of the Ninth Circuit Court of Appeals can be addressed through a mandamus petition. This Court has recognized the prejudice suffered by a state when a federal court refuses to act promptly on a habeas corpus petition.

None of the reasons offered in the response dispels our

> concern that the State of Washington had sustained severe prejudice by the two-and-a-half year stay of execution. The stay has prevented Washington from exercising its sovereign power to enforce the criminal law, an interest we found of great weight in [McCleskey v. Zant] when discussing the importance of finality in the context of federal habeas corpus proceedings

In re Blodgett, 112 S. Ct. at 676 (citation omitted, emphasis added). As with the State of Washington in Blodgett, California is suffering a severe diminution of its sovereign power.

> Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a state to pass laws means little if the state cannot enforce them

McCleskey v. Zant, 499 U.S. ___, 113 L. Ed. 2d 517, 543, 111 S. Ct. 1454, 1469, (1991), emphasis added. The diminution of sovereignty is even greater for the State of California in this case because the federal courts have prevented the state

from enforcing its criminal laws against Wade through a habeas, appeal, remand and more habeas proceedings.

The State seeks a prompt decision of this matter.

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot be but war with the underlying substantive commands. . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.

McCleskey v. Zant, 113 L. Ed. 2d at 543, 111 S. Ct. at 1469 (quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Har. L. Rev. at 452-453 (1963)). A court immobilized in its search for justice provides none. The Ninth Circuit Court of Appeals' duty is not to achieve absolute certainty on an issue before it, but

simply, after due consideration to decide it.

> With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821), emphasis added. Ever-delayed justice is no justice at all.

California continues to suffer prejudice based on the Ninth Circuit Court of Appeals' failure to act. Therefore, the state's right to a writ is "clear and indisputable." Mallard, 109 S. Ct. at 1822.[1] At a minimum, the Ninth Circuit

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1. The Ninth Circuit Court of Appeals has not officially responded concerning why it is taking so long to process this capital habeas corpus appeal. Any excuse based on current case load is unacceptable, and has been repeatedly rejected as a matter of law. McClellen v. Young, 421 F.2d at 691 (excessive volume of pending habeas petitions insufficient ground to justify delay in deciding them); see also Jones v. Shell, 572 F.2d 1278, 1280 (8th Cir.

Court of Appeals is continuing to violate the duty recognized by this Court in Blodgett.

3. California requests that this Court exercise its supervisorial authority and establish a 120-day time limit for ruling on appeals from denial of habeas corpus on capital cases

Although the time taken to issue a decision is generally within a court's discretion, a party may obtain a writ of mandamus when it shows that the court has abused its discretion. Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 84-85 (1970); La Buy v. Howes Leather Co., 352 U.S. at 257. In Blodgett, this Court stated that the federal courts had a duty in capital cases to "take all steps necessary to ensure a prompt resolution of the matter." 116 L.

1978) (busy court docket cannot justify 14-month delay in processing claim from date of remand). Any other result would render the holding of In re Blodgett a nullity.

Ed. 2d at 676, 112 S. Ct. at 676, emphasis added. Clearly, the Ninth Circuit Court of Appeals has failed to follow the Blodgett mandate. Moreover, no procedures or rules are in place to ensure compliance with Blodgett by the Ninth Circuit Court of Appeals. To redress this lack of guidance, respondent requests this Court order the Ninth Circuit Court of Appeal to rule within specified times on appeals in all pending capital cases once the briefing is complete or oral argument held before the court.[2/] The failure to decide

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2. A period of 120 days from the time the reply brief is due may be a reasonable guideline for decision. The local rules of the United States District Court for the Southern District of California contemplate a 120 day temporary stay "to allow newly appointed counsel to prepare and file the petition." West, Cal. Rules of Court, Federal, p. 675, LR 9.3b8c, habeas corpus and motions under § 2255.

American Bar Association recommendations suggest a one year statute of limitations (beginning "upon completion of the state direct review process") for filing all post-conviction applications in capital work. It points

a case within that time constraint would constitute a prima facie showing that the court has not complied with the Blodgett mandate, resulting in the issuance of an order to show cause. This option would establish guidelines to be followed in every case, obviating the need to relitigate the issue in every pending capital case and continuously in each individual case. Long delays in decision of capital cases are recurring in the Ninth Circuit. See, Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987), remanded Lewis v. Jeffers, 497 U.S. 764 (1990); Jeffers v. Lewis, 5 F.3d 1199 (9th Cir. 1992); Hamilton v. Vasquez, ___ F.2d ____, 94 DAR 1490 (9th Cir. 2/3/94).

The Blodgett mandate is clear, federal courts must establish procedures

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out this Court resolves Petitions for Certiorari in 90 days if filed during the regular term and 120 days if filed during the summer. 40 Am. Univ. Law Rev. 1, Recommendation 13 (1990).

and practices to ensure "prompt" resolution of habeas corpus petitions in capital cases. The Ninth Circuit Court of Appeals has failed to do so. Setting time limits for ruling on appeals allows some flexibility, while providing assurances to the states that the current practice of allowing capital cases to languish in the Ninth Circuit Court of Appeals for years before ruling will not be condoned or permitted.

This Court has long recognized the overriding policy of preventing federal interference with the state's fundamental interest in the administration of its own criminal justice system. Coleman v. Thompson, ___ U.S. ___, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991); McCleskey v. Zant, 11 S. Ct. 1454; Teague v. Lane, 489 U.S. 288, 309 (1989); Francis v. Henderson, 425 U.S. 536, 539 (1976).

California believes that establishing these time limits for the Ninth Circuit Court of Appeals to rule on pending capital habeas corpus appeals is not only warranted, but absolutely essential for the orderly administration of justice.

CONCLUSION

For all of the above stated reasons, the State of California respectfully requests that the Court grant a Writ of Mandate and order the Ninth Circuit Court of Appeals to render a decision on the appeal from the denial of Wade's petition for writ of habeas corpus within 120 days of the issuance of the order of this Court

DATED this 17th day of February, 1994.

Respectfully submitted,

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E X H I B I T A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELVIN MEFFREY WADE,	No. 90-56332
Petitioner-Appellant,	D.C. No. CV-89-0173-MLR
v.	
DANIEL VASQUEZ, Warden of San Quentin; ATTORNEY GENERAL OF CALIFORNIA,	ORDER
Respondents-Appellees.	

Before: CANBY, REINHART, and TROTT, Circuit Judges

The motion of the Attorney General for a decision within 60 days is denied. The motion in this case, which involves a first petition, is inconsistent with the duty of a reviewing court in a death penalty case "to give full and fair consideration to all of the issues presented in the case." In re Blodgett, 112 S.Ct. 674, 676 (1992).

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

No: 94 _____
October Term, 1994

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In re ARTHUR CALDERON,
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Prison and
DANIEL E. LUNGREN,
Attorney General of the
State of California

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92186-5266.

I have served the within PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES SUPREME COURT OF APPEALS FOR THE NINTH CIRCUIT as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 18th day of February 1994.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, February 18, 1994.

Anne Marie Buford
ANNE MARIE BUFORD

Subscribed and sworn to before me
this 18th day of February, 1994.

Betty A. Hitchingham
Notary Public in and for said County and State

OFFICIAL SEAL
BETTY A. HITCHINGHAM
NOTARY PUBLIC-CALIFORNIA
COMMISSION # 969490
SAN DIEGO COUNTY
My Commission Exp. July 18, 1996